ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2004

Mr. W. Lane Lanford
Executive Director
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2004-3729

Dear Mr. Lanford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199909.

The Public Utility Commission of Texas (the "commission") received a request for information relating to Project No. 25937. You state that some information will be released but claim that portions of the submitted information are excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.117 of the Government Code. You also claim that release of the requested information may implicate the proprietary interests of third parties, although you take no position as to whether the information is so excepted. You state, and provide documentation showing, that you notified the Electric Reliability Council of Texas ("ERCOT"); Automated Power Exchange, Inc. ("APX"); Texas Independent Energy ("TIE"); Exelon Generation Company ("Exelon"), Strategic Energy, L.L.C. ("SE"); Mirant Americas Energy Marketing, L.P. ("Mirant"); FLP Energy Power Marketing, Inc. ("FLP-EPM"); American Electric Power Service Corporation ("AEP"); ANP Funding I, L.L.C. ("ANP"); Aquila Energy Marketing Corporation ("AEMP"); BTU QSE Services, Inc. ("BTU-QSE"); BPTX; Calpine Power Management, L.P. ("CPM"); Austin Energy;[1] City of Garland ("Garland"); Constellation Power Source, Inc. ("Constellation"); Coral Power, Inc.

[1]We note that both the City of Austin and GulfTerra Texas Pipeline, L.P. have submitted arguments on behalf on Austin Energy. However, GulfTerra submits arguments only in reference to its proposal relating to a specified commission project. The commission did not submit the proposal at issue for our review as part of the information responsive to the present request. Therefore, we will not address GulfTerra's arguments against disclosure.

("Coral"); Dynegy Power Marketing, Inc. ("Dynegy"); Lower Colorado River Authority ("LCRA"); PG&E Energy Trading Power, L.P. ("PG&E"); Reliant Energy Services, Inc. ("Reliant"); South Texas Electric Co-op, Inc. ("STEC"); Tenaska Power Services Company ("Tenaska"); Texas Genco, L.P. ("Genco"); TXU Portfolio Management Company, L.P. ("TXU"); City Public Service of San Antonio ("CPS"); Corrugated Services, L.P. ("Corrugated"); El Paso Merchant Energy, L.P. ("EPME"); Morgan Stanley Capital Group, Inc. ("Morgan Stanley"); Cargill Power Markets, L.L.C. ("Cargill"); BPEC; and GEXA Corporation ("GEXA") of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act ("Act") in certain circumstances). We have considered all the submitted arguments and reviewed the submitted representative samples of information.[2]

Initially, we note that you, as well as some of the notified third parties, assert that portions of the submitted information are subject to the commission's Substantive Rule section 25.362(e)(2). You state that this rule "prohibits the public disclosure of information obtained from ERCOT's information systems that is considered 'Protected Information'" and that the submitted "bid or pricing information" for certain market participants is designated as "Protected Information" under the ERCOT Protocols section 1.3. However, you also indicate that this designation is only valid for 180 days after the applicable operating day, at which point the information becomes publicly available through ERCOT. Review of the submitted information indicates that the information at issue is no longer protected under the ERCOT Protocols section 1.3. Therefore, this information may not be withheld on this basis.

We also note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" is public unless that information is expressly made confidential under other law or is excepted from disclosure under section 552.108. Gov't Code § 552.022(a)(1). The submitted information constitutes a completed investigation. Therefore, pursuant to section 552.022, the submitted information must be released unless it is expressly confidential under other law or excepted from disclosure under section 552.108. Sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676

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[2] We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially differenttypes of information than that submitted to this office.

at 6 (2002) (information subject to section 552.022 may not be withheld under section 552.107), 473 (1987) (section 552.111 may be waived); *see also* 522 at 4 (1989) (discretionary exceptions generally). Therefore, the commission may not withhold any portion of the submitted information under sections 552.103, 552.107, or 552.111.

You further contend, however, that Exhibits AA through II are confidential under Texas Rule of Evidence 503. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider whether Rule 503 applies to Exhibits AA through II.

Rule 503(b)(1) provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
> >
> > (B) between the lawyer and the lawyer's representative;
> >
> > (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
> >
> > (D) between representatives of the client or between the client and a representative of the client; or
> >
> > (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that

it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You explain that Exhibits AA through II are communications between commission staff and attorneys made for the purpose of providing legal advice. You state that these communications were intended to be confidential and that their confidentiality has been maintained. After reviewing your arguments and the submitted documents, we agree that Exhibits AA through II are privileged attorney-client communications that may be withheld under Rule 503.[3]

Next, we will address whether the remaining submitted information contains third party proprietary information that must be withheld from disclosure. An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, ERCOT, TIE, Exelon, SE, Mirant, FLP-EPM, AEP, ANP, AEMP, BTU-QSE, BPTX, CPM, Garland, Constellation, Coral, Dynegy, LCRA, PG&E, Reliant, STEC, Tenaska, CPS, Corrugated, EPME, Morgan Stanley, Cargill, BPEC, and GEXA have not submitted any comments to this office explaining how release of the requested information would affect their proprietary interests. Therefore, these third parties have provided us with no basis to conclude that they have protected proprietary interests in any of the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 661 at 5-9 (1999), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, the commission may not withhold any portion of the requested information to protect the proprietary interests of these third parties.

You indicate that the information submitted to the commission by TXU is subject to a confidentiality agreement. We note, however, that information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. A governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under the [predecessor to the] Act cannot be compromised simply by its decision to enter into a contract. *See* Attorney

[3]As we are able to make this determination, we do not reach Austin Energy's arguments under section 552.133 of the Government Code.

General Opinion JM-672 (1987); Open Records Decision No. 514 (1988)."); *see also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (governmental agency may not bring information within scope of predecessor to section 552.101 by promulgation of rule; to imply such authority merely from general rule-making powers would be to allow agency to circumvent very purpose of predecessor to Act), *Bristol- Myers Squibb Co. v. Goldston*, 957 S.W.2d 671, 673 (Tex. App.—Fort Worth 1997, pet. denied) ("Because venue is fixed by law, any agreement or contract whereby the parties try to extend or restrict venue is void as against public policy."). Consequently, the requested information must fall within an exception to disclosure in order to be withheld.

APX and TXU argue that portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;

> (2) the extent to which it is known by employees and others involved in [the company's] business;
>
> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
>
> (4) the value of the information to [the company] and to [its] competitors;
>
> (5) the amount of effort or money expended by [the company] in developing this information; and
>
> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

APX asserts that Exhibit UU-6 is excepted from disclosure under section 552.110. Upon review of APX's arguments and the submitted information, we find that APX has made a specific factual or evidentiary showing that the release of a portion of Exhibit UU-6 would cause the company substantial competitive harm. This information, which we have marked, must be withheld pursuant to section 552.110(b).[4] With respect to the remaining information in Exhibit UU-6, however, we determine that the company has not demonstrated that this information meets the definition of a trade secret, nor has the company made a *prima facie* case to establish a trade secret claim for this information. We further find that APX has only provided conclusory statements that release of the remaining information in Exhibit UU-6 would harm its competitive interests and has not provided specific factual evidence to

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[4]As we are able to make this determination, we do not reach APX's arguments under ERCOT Protocols § 1.3.

substantiate the claim that release of this information would result in competitive harm to the company. *See* Open Records Decision No. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, we determine that none of the remaining information in Exhibit UU-6 is excepted from disclosure under section 552.110.

TXU asserts that Exhibits LL, MM, PP, RR, SS, and portions of Exhibits TT and EEE are excepted from disclosure under section 552.110. Upon review of TXU's arguments and the submitted information, we find that TXU has made a specific factual or evidentiary showing that the release of certain portions of Exhibits RR and TT would cause the company substantial competitive harm. This information, which we have marked, must be withheld pursuant to section 552.110(b). With respect to the remaining information at issue, however, we determine that the company has not demonstrated that this information meets the definition of a trade secret, nor has the company made a *prima facie* case to establish a trade secret claim for this information. We further find that TXU has only provided conclusory statements that release of the information at issue would harm its competitive interests and has not provided specific factual evidence to substantiate the claim that release of this information would result in competitive harm to the company. Accordingly, we determine that none of the remaining information is excepted from disclosure under section 552.110.

APX and TXU assert that portions of the remaining information are excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. TXU asserts that the information at issue is confidential under section 39.155(a) of the Utilities Code, which provides as follows:

> Each person, municipally owned utility, electric cooperative, and river authority that owns generation facilities and offers electricity for sale in this state shall report to the commission its installed generation capacity, the total amount of capacity available for sale to others, the total amount of capacity under contract to others, the total amount of capacity dedicated to its own use, its annual wholesale power sales in the state, its annual retail power sales in the state, and any other information necessary for the commission to assess market power or the development of a competitive retail market in the state. The commission shall by rule prescribe the nature and detail of the reporting requirements and shall administer those reporting requirements in a manner that ensures the confidentiality of competitively sensitive information.

Util. Code § 39.155(a). APX argues that the information at issue is confidential under the commission's Procedural Rules section 22.71(d) and Substantive Rules subsections 25.91(e) and (h). Section 22.71(d) sets forth procedures pertaining to the filing of confidential pleadings and other documents with the commission. *See* 16 Tex. Admin. Code § 22.71(d).

Subsections 25.91(e) and (h) allow for parties responsible for reporting information to the commission to designate that information as confidential.[5] *See* 16 Tex. Admin. Code § 25.91(e), (h). Upon review, we determine that section 39.155(a) grants the commission the authority to set forth rules regarding the treatment of competitively sensitive information while it is in the hands of the commission. However, we find that, for the purposes of the Act, section 39.155(a) is not determinative of what information is confidential under the Act. In addition, we determine that section 39.155(a), section 22.71(d), and subsections 25.91(e) and (h) do not make the information at issue expressly confidential for purposes of section 552.101. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Rather, section 22.71(d) and subsections 29.51(e) and (h) provide procedures for how information should be designated and labeled by the parties and how the commission should maintain the information internally. Therefore, the remaining information at issue is not excepted from disclosure under section 552.101.

Finally, we note that some of the remaining submitted information is subject to section 552.137 of the Government Code, which provides:

> (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
>
> (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
>
> (c) Subsection (a) does not apply to an e-mail address:
>
> > (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
> >
> > (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

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[5]Section 25.91(e) states that information designated as confidential by the reporting party will be treated in accordance with the standard protective order issued by the commission. *See* 16 Tex. Admin Code § 25.91(e). We note that neither the commission nor the interested third parties have indicated that the commission issued such a protective order with regards to the information at issue in the present request.

> (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or
>
> (4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.
>
> (d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address, or the general e-mail address of a business. E-mail addresses within the scope of section 552.137(c) are also not excepted from disclosure under section 552.137. We determine that the e-mail addresses we have marked are within the scope of section 552.137(a). Unless the commission has received affirmative consent to disclose these e-mail addresses, the commission must withhold the marked e-mail addresses under section 552.137. As the commission claims no other exceptions for the remaining submitted information, it must be released.

In summary, the commission may be required to withhold the information we have marked under section 552.137. The commission may withhold Exhibits AA, BB, CC, DD, EE, FF, GG, HH, and II pursuant to Texas Rule of Evidence 503. The commission must withhold the marked portions of Exhibits RR, TT, and UU-6 under section 552.110. The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Amy D. Peterson
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ADP/sdk

Ref: ID# 199909

Enc. Submitted documents

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